



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNR, FFT / OPR-DR, MNR-DR, FFL

Introduction

The hearing was convened following applications for dispute resolution (Applications) from both parties under the *Residential Tenancy Act* (the Act), which were crossed to be heard simultaneously.

The Tenant seeks the following:

- an order canceling a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) under section 46(4)(b) of the Act; and
- to recover the cost of the filing fee from the Landlord under section 72 of the Act.

The Landlord requests the following:

- an Order of Possession after issuing the 10 Day Notice under section 55(2)(b) of the Act;
- a Monetary Order for unpaid rent and utilities under sections 26 and 67 of the Act; and
- authorization to recover the filing fee for their Application from the Tenant under section 72 of the Act.

Issues to be Decided

- 1) Should the 10 Day Notice be canceled?
- 2) If not, is the Landlord entitled to an Order of Possession?
- 3) Is the Landlord entitled to a Monetary Order for unpaid rent?
- 4) Are either party entitled to recover the filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this Decision.

The parties agreed on the following regarding the tenancy:

- The tenancy began on June 1, 2021.
- Rent is \$2,537.50 per month due on the first day of the month.
- A security deposit of \$1,250.00 and a pet damage deposit of \$1,250.00 was paid by the Tenant which the Landlord still holds.
- There is a written tenancy agreement which was entered into evidence.
- The Tenant still occupies the rental unit.

Counsel for the Landlord submitted as follows. The 10 Day Notice was issued as the Tenant did not pay rent due May 1, 2023. A copy of the 10 Day Notice was entered into evidence. The Notice is dated May 17, 2023 and provides an effective date of May 31, 2023. The amount of outstanding rent is given as \$2,537.50, as of May 1, 2023.

The Landlord believes the Tenant did not pay rent as a Two Month Notice to End Tenancy (Two Month Notice) had been issued to the Tenant, which the Tenant then disputed. The hearing where the validity of the Two Month Notice was discussed took place on May 23, 2023. A copy of the Two Month Notice was entered into evidence and is signed January 17, 2023 with an effective date of May 31, 2023. The reason for the notice is given as the rental unit will be occupied by the landlord or the landlord's spouse.

Prior to the hearing, the Landlord had withdrawn the Two Month Notice via a letter to the Tenant dated May 5, 2023, as they could no longer fulfil their plans to move from China to occupy the rental unit.

Following the May 23, 2023 hearing and the decision of the same date, the arbitrator found the Two Month Notice was of no force or effect. The Tenant understood this decision as they deducted \$100.00 from rent for the next month, as authorized by the arbitrator. The Tenant paid the rent due June 1 and July 1, 2023, but not the rent still owing for May 1, 2023. No receipts for "use and occupancy" were issued to the Tenant

following payment of rent in June and July 2023. The Landlord seeks an Order of Possession and Monetary Order for unpaid rent.

The Tenant testified as follows. They were following procedures while they worked out if the Two Month Notice was valid.

They knew they were entitled to the last month of rent for free under the Two Month Notice and wanted to wait until the hearing on May 23, 2023. The Tenant acknowledged that following the hearing, they do owe rent, which they will pay and have never been late paying rent before.

Analysis

Section 26 of the Act requires tenants to pay rent on time unless they have a legal right to withhold some, or all, of the rent. The Act sets out limited circumstances in which monies claimed by the tenant can be deducted from rent, which include when a tenant has received a Two Month Notice to End Tenancy for Landlord's Use and they withhold the last month's rent under section 51.4(2) of the Act. The Act is silent on if this right for the Tenant to withhold the last month's rent is revoked if a Two Month Notice to End Tenancy is disputed by the Tenant.

Given this, I find that the issuing of the Two Month Notice entitled the Tenant to withhold rent due on May 1, 2023, being the last month of the tenancy, per the effective date of the Two Month Notice. Though the letter dated May 5, 2023 stated the Landlord will be "revoking and canceling" Two Month Notice, Policy Guideline 11 - Amendment and Withdrawal of a Notice to End Tenancy is clear that neither a tenant or a landlord can unilaterally withdraw a Notice to End Tenancy and that a notice to end tenancy may be withdrawn prior to its effective date only with the consent both parties. As nothing before me indicated that this consent from the Tenant had been provided, I find that the Two Month Notice was only canceled following the hearing and decision dated May 23, 2023. Accordingly, I find the Tenant's obligation to pay rent due May 1, 2023 only returned after the decision dated May 23, 2023.

As the 10 Day Notice was issued before this date, I am not satisfied on a balance of probabilities that it was issued for a valid reason of non-payment of rent, as, at this time, the Tenant had the right to withhold rent due May 1, 2023.

Given this, I grant the Tenant's Application and I order the 10 Day Notice to End Tenancy is of no force or effect and the tenancy will continue until it is ended in accordance with the Act. The Landlord's Application is dismissed without leave to reapply.

As the Tenant has been successful in their Application, I find they are entitled to the reimbursement of the filing fee. I order that the Tenant may make a one-time deduction of \$100.00 from a future rent payment in satisfaction of the return of the filing fee.

As the Landlord's Application was not successful, they must bear the cost of the filing fee.

Conclusion

The Tenant's Application is granted. The 10 Day Notice is canceled. The tenancy continues.

The Landlord's Application is dismissed without leave to reapply.

This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: July 17, 2023

Residential Tenancy Branch